In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 547

WILLOW TERRACE DEVELOPMENT CO., INC., AND POST OAK MANOR BUILDING CO., INC., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The issue presented by this petition is essentially one of fact—whether the valuation of certain houses, as found by the Tax Court and sustained by the court of appeals, was supported by ample evidence.

Petitioner Post Oak Manor Building Company, Inc. (Building Company) was engaged in developing real estate subdivisions in the Houston area. When it sold new houses it often accepted the customer's equity interest in his old home as part of the down payment on the new house. The trade-in houses all had outstanding mortgages on them, and Building

Company acquired them subject to prior encumbrances. During the years involved, Building Company received 151 houses in this manner and gave trade-in allowance in the total amount of $348,609.73.[1] Petitioner attempted to resell these houses as soon as possible, and all 151 were sold under contracts for a deed. The purchasers made a small down payment, usually $200, agreed to pay the balance of the purchase price after the existing mortgage was satisfied, and bound themselves to pay interest in the interim. The total face amount of the 151 contracts was approximately $392,600. Of this amount, petitioner received approximately $34,000 in cash, all but approximately $9,000 of which was used to pay selling expenses. There was no established market in the Houston area for these contracts, on which an unpaid balance of $358,600 remained. (Pet. 17–19.)

Section 1001(b) of the Internal Revenue Code of 1954 provides that the "amount realized from the sale * * * of property shall be the sum of any money received plus the fair market value of the property (other than money) received." It is conceded by all parties that this statute requires petitioner to include in its income the fair market value of the houses it received as trade-in allowances. Thus the sole ques-

[1] Actually title to the trade-ins was taken in the name of Building Company's sister corporation, Terwil Corp.

tion presented here is whether, as the court of appeals found, there was sufficient evidence to support the Tax Court's findings of fact on value.

The Commissioner determined that the houses received by petitioner were worth the amount petitioner gave as a trade-in allowance, *i.e.*, approximately $348,600. After a full hearing the Tax Court held that Building Company failed to sustain its burden of proving that the fair market value of the trade-in houses was less than $348,600 (Pet. 19–20). The court of appeals affirmed, stating that (Pet. 20–21):

> * * * the testimony of the Commissioner's witnesses was adequate, if credited as it was by the Tax Court, to carry the day for the Commissioner, and the finding by the Tax Court was in no event clearly erroneous.

1. Petitioner argues that the courts below disregarded evidence supporting petitioner's contentions and ignored the costs of resale. Petitioner is merely attempting to reargue the factual issue that has already been litigated before two courts. To whatever extent the Tax Court chose to follow the Commissioner's expert appraisers and disregard petitioner's evidence of market value, it was, of course, fully entitled to do so in discharging its fact-finding function. Moreover, even assuming the validity of petitioner's contentions, they would merely establish that the fair market value of the houses was something less

than the lower courts have found it to be, a matter which hardly warrants review by this Court.[2]

2. Nor did the lower courts apply an erroneous legal standard of value. If petitioner is attempting to equate "fair market value" with "immediately realizable cash," it ignores the settled law, as illustrated by a case which petitioner cites (Pet. 10), *Stiles* v. *Commissioner,* 69 F. 2d 951, 952 (C.A. 5). That case specifically rejected the notion that fair market value is the equivalent of "readily realizable market value." Instead, it adopted the definition of fair market value which has become the standard and which was applied here by the courts below, *i.e.,* "the value of the property in money to one who wishes to sell to a purchaser who wishes to buy." (69 F. 2d at 952; see Pet. 20.) *Stiles* expressly recognized that "It is not necessary * * * that the property be readily salable in open market." (69 F. 2d at 952-953.)

3. Petitioner also argues that the result below conflicts with *Burnet* v. *Logan,* 283 U.S. 404. In that case the Court refused to assign a fair market value to a contract right entitling the holder to a specified

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[2] On the one hand the *amicus* flatly argues that since the contracts received by petitioner upon sale of the trade-in houses were "mere promise[s] of future payments," they do "not have a fair market value." On the other, it asserts that in valuing the contracts the Tax Court looked "solely to the 'price' without considering * * * the terms of purchase." Aside from the inconsistency of these arguments, the value of the homes received by petitioner (which is the question at hand) did not rest solely on the value of the contracts and cash petitioner received upon their resale. The Tax Court also had the testimony of expert appraisers supporting the Commissioner's determination.

portion of the future proceeds of an iron ore mine. Unlike that case, however, the value of the houses received by petitioner did not depend on an unpredictable contingency, such as the future proceeds of a mine. Like virtually all tangible assets, they had an ascertainable value and a current sales market. Most of them were in fact sold within days after their acquisition.

Petitioner's complaint is, in essence, that it was unable to convert its interest in the houses into immediate cash. Rather, it received a relatively small amount of cash and interest-bearing obligations for the remainder. The amount petitioner realized upon sale of the houses is some evidence of their market values and was so considered by both courts below (R. 481; Pet. 20). The fact that the sales price was not payable in cash but at a future date (plus interest) hardly supports a contention that the houses had no ascertainable market value in the first instance.

The decision below is correct and there is no conflict of decisions. The issue is primarily a factual one and does not warrant further review by this Court. The petition for a wit of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

MELVA M. GRANEY,
ROBERT A. BERNSTEIN,
Attorneys.

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